



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

JAN 07 2003

2004

The Honorable Kathleen A. McGinty, Secretary  
Pennsylvania Department of Environmental Protection  
P. O. Box 2063  
Harrisburg, PA 17105-2063

Dear Secretary McGinty: *Katie*

The Pennsylvania Department of Environmental Protection (PADEP) finalized new and revised water quality standards and permit regulations by publishing the revised regulations in the *Pennsylvania Bulletin* on November 18, 2000. As part of the Commonwealth of Pennsylvania's (Commonwealth) revision process, called the Regulatory Basics Initiative (RBI), the Commonwealth evaluated regulations considering several factors. The Commonwealth considered whether these requirements were more stringent than Federal regulations without good reason; impose economic costs disproportionate to the environmental benefit; are prescriptive rather than performance-based; inhibit green technology and pollution prevention strategies; are obsolete or redundant; lack clarity; or are written in a way that causes significant noncompliance. The result of the RBI was a streamlined water quality standards regulatory package and a more streamlined National Pollutant Discharge Elimination System (NPDES) program.

The Commonwealth forwarded its revised water quality standards and supporting material to the U. S. Environmental Protection Agency (EPA) for review in accordance with Clean Water Act (CWA) Section 303(c)(2)(A) on December 15, 2000. EPA reviewed and approved the package on August 8, 2001. PADEP also requested review and approval of its NPDES regulations and forwarded Chapters 92, 95, and 97 to EPA on January 12, 2001.

EPA has determined that the Pennsylvania NPDES Regulation Revision constitutes a substantial revision to Pennsylvania's authorized NPDES program, therefore, solicited public comments under 40 CFR Part 123.62(b)(2). EPA Region III has completed its review and hereby approves the new and revised portions of the Commonwealth's NPDES submission as consistent with the requirements of the CWA and 40 CFR Part 123.25. EPA Region III does have concerns with other portions of the Commonwealth's existing NPDES regulations. We are concerned with PADEP's regulations at 25 PA Code Chapter 95.4 which address the use of time extensions to achieve water quality based effluent limits, and will address that concern in a separate letter.



As part of EPA's obligation under the Endangered Species Act (ESA), EPA prepared a biological evaluation to determine if our approval of the new and revised sections of the NPDES regulations will adversely affect threatened and endangered species and their critical habitat in Pennsylvania. Our biological evaluation found that our approval action would not adversely affect threatened or endangered species. We have shared this biological evaluation with the Fish and Wildlife Service and the National Marine Fisheries Service, and they concurred with our finding on March 3, 2003 and October 11, 2002, respectively. We are enclosing a copy of the evaluation for your information. The completion of the biological evaluation and concurrence from the above Services fulfills our obligation under Section 7 of the ESA on this Federal action.

We are looking forward to working with you and your staff on any further modifications to the Commonwealth's NPDES permit program. If you have any questions, please feel free to contact me or have your staff contact Evelyn MacKnight, PA/DE/WV Branch Chief, at (215) 814-5752.

Sincerely,



Donald S. Welsh  
Regional Administrator

Enclosure

cc: Cathy Myers (PADEP)  
Eric Conrad (PADEP)  
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Milt Lauch (PADEP)  
David Densmore (US FWS)  
Patricia Kurkul (NMFS)

**Biological Evaluation  
for the Approval of  
the Commonwealth of Pennsylvania  
Revision of National Pollutant Discharge Elimination System Program  
by EPA Region III  
under Clean Water Act Section 402 and 40 CFR 123.62**

**Federal Action:**

The Federal action being evaluated is the Environmental Protection Agency's (EPA) approval of a substantial National Pollutant Discharge Elimination System (NPDES) program revision by the Commonwealth of Pennsylvania on June 20, 2000. Only those parts of the regulation that were added or revised were considered as part of this evaluation.

**Background on Pennsylvania's NPDES Program Revisions:**

This modification of Pennsylvania's NPDES regulation was done as part of its Regulatory Basics Initiative (RBI). Through the RBI process, the Department of Environmental Protection (DEP) evaluated regulations considering several factors including whether requirements are more stringent than Federal regulations without good reason; impose economic costs disproportionate to the environmental benefit; are prescriptive rather than performance-based; inhibit green technology and pollution prevention strategies; are obsolete or redundant; lack clarity; or are written in a way that causes significant noncompliance.

The amendments were finalized at the Environmental Quality Board (EQB) meeting on June 20, 2000. They appeared in the *Pennsylvania Bulletin* on November 18, 2000. Although that notice indicated that these amendments were effective upon publication, according to 40 CFR §123.62(b)(4), a program revision shall become effective upon the approval of the Administrator (note: that authority has been delegated to the Regional Administrator). The regulation was sent to EPA on December 15, 2000 for our review and approval under Clean Water Act (CWA) Section 402 and 40 CFR §126.62(b)(3), and was received on December 20, 2000.

**Action Area:**

The area evaluated for action is the Commonwealth of Pennsylvania. In particular the Commonwealth's NPDES permit regulations, which are set forth in Chapter 92.

## **List of Federally Listed Species Which May be Found Within the Action Area:**

The list (Attachment 1) includes all threatened and endangered species compiled by the Fish Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) for the Commonwealth of Pennsylvania. The species listed include plants, mollusks, fishes, reptiles, birds, and mammals. The level of information for each species varies. Only a limited number of threatened or endangered species are aquatic organisms. For this evaluation we are considering the aquatically dependent species that still occur in Pennsylvania. These would include the northeastern bulrush, the clubshell mussel, the northern riffleshell mussel, the shortnose sturgeon, the bog turtle and the bald eagle.

### *Plants:*

The two listed plants have the common names of the northeastern bulrush and small-whorled pogonia. The northeastern bulrush (*Scirpus ancistrochaetus*) is listed as endangered and is currently found in Adams, Bedford, Blair, Carbon, Centre, Clinton, Cumberland, Dauphin, Franklin, Huntingdon, Lackawanna, Lehigh, Lycoming, Mifflin, Monroe, Perry, Snyder and Union counties. In Pennsylvania, this plant is found in forested wetlands, woodland ponds, vernal pools, emergent wetlands, and ombrotrophic march/shrub swamps. According to the recovery plan, the most immediate threats to the species are human-related activities that lead to the destruction or modification of its habitat. In the Commonwealth, the threats to the population include agricultural runoff, timbering and residential development. There is also evidence that deer, nutrient enrichment and the intrusion of exotic plant species are impacting the remaining populations.

The other plant is the small-whorled pogonia (*Isotria medeoloides*). Listed as threatened, it is currently found in Centre and Venango counties. Its preferred habitat is second growth or relatively mature forests. The main threats to this orchid are collecting and habitat alteration.

### *Mollusk:*

There are two endangered mussels listed for the Commonwealth of Pennsylvania, the clubshell mussel (*Pleurobema clava*) and the northern riffleshell mussel (*Epioblasma torulosa*). They are both listed as endangered, and they are found in the French Creek and Allegheny River watersheds, which span Clarion, Crawford, Erie, Forest, Mercer, Venango and Warren counties.

According to the recovery plan, few mussel species have declined in numbers as drastically as these two species. The clubshell is found in clean, coarse sand and gravel in runs, often just downstream of a riffle. It cannot tolerate mud or slackwater conditions, and is very susceptible to siltation. The northern riffleshell also occurs in packed sand and gravel in riffles and runs. Both species are threatened by runoff and channelization, domestic and commercial pollution, in-stream sand and gravel mining, impoundments, and zebra/quagga mussel infestation.



### *Fish:*

Shortnose sturgeon (*Acipenser brevirostrum*) is the only fish listed as endangered in Pennsylvania. The shortnose sturgeon live in fresh and saltwater environments, migrating between freshwater and mesohaline river reaches. One of their sensitive life stages, spawning, is connected to river temperature. For shortnose sturgeons which are located in the Delaware River, they spawn near Scudders Falls north of Lambertville, New Jersey. The shortnose sturgeons are benthic omnivores continuously feeding on crustaceans, insect larvae, worms, and mollusks. According to the recovery plan shortnose sturgeon are affected by dredging, pollutant discharges and impingement from intake structures, and bridge and dam construction.

### *Reptiles:*

The bog turtle (*Clemmys muhlenbergii*) is listed as threatened in Pennsylvania. It is currently found in Adams, Berks, Bucks, Chester, Cumberland, Delaware, Franklin, Lancaster, Lebanon, Lehigh, Monroe, Montgomery, Northampton and York counties. Bog turtles live in relatively open portions of sphagnum bogs, swamps or marshy meadows with slow moving, spring fed streams or spring runs with soft bottoms. The primary reason that bog turtles are threatened is the draining or other destruction of their habitat. Also, many have been illegally removed for commercial purposes.

The eastern massasauga rattlesnake (*Sistrurus catenatus catenatus*) has recently been listed as a candidate species. This species is currently found in Butler, Crawford, Mercer and Venango counties. Massasauga require a combination of wet and dry habitat found in prairie terrain, rare in Pennsylvania. The species was never common in the Commonwealth, and now may be found in only half of their historic sites due to dam building, highway construction, urbanization, forest succession, surface mining and agricultural activity.

### *Birds:*

There are two birds listed. Bald eagles (*Haliaeetus leucocephalus*) are listed as threatened. There are suitable habitats found across the state, and recent nesting has been observed in Butler, Crawford, Dauphin, Erie, Forest, Lancaster, Mercer, Northumberland, Pike, Tioga, Venango, Warren and York counties. They are found around bodies of water where adequate food exists and human disturbance is limited. Wintering concentrations occur in association with ice-free sections of rivers, lakes and reservoirs, including the Delaware River. Pesticides, notably DDT, were part of the cause for the decline of eagles. Since the banning of these pesticides there have been increases to the population, but there is still evidence of pesticides in the environment. Protection of nesting habitat is also critical to the protection of the species.

The other species listed is the piping plover (*Charadrius melodus*). This species is listed as endangered, and is found at Presque Isle in Erie County. The bird is migratory, and no nesting has been observed in Pennsylvania since the mid-1950s. According to the recovery plan, the major causes of the current downtrend in piping plover population are habitat loss and degradation, disturbance by humans and domestic animals, and increased predation.

### *Mammals:*

The only mammal listed is the Indiana bat (*Myotis sodalis*). It is listed as endangered, and summers in Blair, Elk and McKean counties, and winters in Blair, Luzerne, Mifflin and Somerset counties. Causes of decline listed in the recovery plan include natural hazards, such as the flooding of hibernation caves, and human causes, such a disturbance during hibernation, and habitat destruction.

### **Description of Pennsylvania's NPDES Permit Regulations:**

The Commonwealth's NPDES permit regulations are set forth in Chapters 92 and 95. The provisions of Chapter 92 incorporate by reference portions of Federal regulations. For this reason, it may be necessary to refer to Chapter 92 and 40 CFR Parts 122, 124 and 125 (relating to EPA administered permit programs: the NPDES; procedures for decision making; and criteria and standards for NPDES) to determine applicable requirements.

The Commonwealth of Pennsylvania adopted revisions to its NPDES permit program regulations on June 20, 2000.

Chapter 92 includes:

#### **General Provisions**

<u>Section</u>	<u>Title</u>
1	Definitions
2	Incorporation of Federal regulations by reference
2a	Treatment requirements
2b	Pollution prevention
2c	Minimum sewage and industrial waste treatment requirements
2d	Technology-based standards

#### **Permits**

<u>Section</u>	<u>Title</u>
3	Permit requirement
4	Exclusions from permit requirements
5	NPDES permit satisfies certain other permit requirements
5a	Concentrated animal feeding operations (CAFOs)
7	New or increased discharges or change of wastestreams
8a	Changes in treatment requirements
9	Duration of permits
11	Duration of standards for certain new sources
13	Reissuance or renewal of permits

- 13a Effect of modification of permit
- 15 Regional Administrator's right to object to the issuance or modification of certain permits
- 17 Other chapters applicable

### **Application for Permits**

<u>Section</u>	<u>Title</u>
21	Applications
21a	Additional application requirements for classes of discharges
22	Application fees
23	Identify of signatories to NPDES forms
25	Incomplete applications or notice of intent

### **Approval of Applications**

<u>Section</u>	<u>Title</u>
31	Effluent limitation or standards

### **Monitoring of Permittee**

<u>Section</u>	<u>Title</u>
41	Monitoring

### **Permit Conditions**

<u>Section</u>	<u>Title</u>
51	Standard conditions in permits
52a	Site specific permit conditions
53	Additional standard conditions in permits for publicly-owned treatment works which serve industrial users
55	Schedules of compliance
57	Effluent limitations
59	Documentation for permit conditions
61	Public notice of permit application and public hearing
63	Public access to information
65	Notice to other government agencies
67	Notice of reissuance of permits

## **Miscellaneous**

<u>Section</u>	<u>Title</u>
71	Interim standards
71a	Transfer of permit
72a	Cessation of discharge
73	Prohibition of certain discharges
75	Transmission of NPDES forms
77	Requirement of additional data in certain cases
78	Transmission of issued NPDES permits
79	Reports of violations

## **General Permits**

<u>Section</u>	<u>Title</u>
81	General NPDES permits
82	Public notice and public hearing
83	Inclusion of individual dischargers in general NPDES permits

## **Civil Penalties for Violations of NPDES Permits**

<u>Section</u>	<u>Title</u>
91	Applicability
92	Method of seeking civil penalties
93	Procedure for civil penalty assessments
94	Disbursement of funds pending resolution of appeal

Chapter 95 includes:

## **Wastewater Treatment Requirements**

<u>Section</u>	<u>Title</u>
2	Quality standards and oil-bearing wastewaters
4	Extensions of time to achieve water quality based effluent limitations
5	Treatment requirements for discharges to water affected by abandoned mine drainage

## **Organization of Biological Evaluation**

Because this evaluation will address Pennsylvania's entire NPDES regulation, and the extensive nature of such a review, not all provisions of the NPDES permit regulations will be individually



addressed in this evaluation. The definitions will not be reviewed individually, but rather these terms will be addressed with the provisions in which they appear, if necessary. This evaluation will also not address the following regulations, as EPA considers them mostly administrative and minor in terms of impact on Federally listed threatened and endangered species and their critical habitat in Pennsylvania:

§§ 92.3, 92.4, 92.5, 92.7, 92.9, 92.11, 92.13, 92.13a, 92.22, 92.23, 92.63, 92.71a, 92.72a, 92.75, 92.77, 92.78, 92.79, 92.91, 92.92, 92.93, and 92.94.

During the RBI, Pennsylvania also created Chapter 96, which was titled "Water Quality Standards Implementation." Chapter 96 was submitted to EPA for our "reference and general information," but not for review and action under Section 303 of the Clean Water Act. Because it was not submitted for EPA review, we could not take a specific approval, or disapproval action for Chapter 96. EPA Region III can recommend that the Administrator use her discretionary authority under CWA Section 303(c)(4)(B) to find that a revised or new standard is necessary to meet the requirements of the Clean Water Act. While this evaluation will not address this chapter, permit objections from EPA may be the most effective tools to address these regulations should they be used in a manner that will not protect water quality, and threatened and endangered species, in the Commonwealth.

#### **Manner in Which the Action May Affect Listed Species:**

The following is a list of the NPDES regulations that EPA has determined could impact Federally-listed threatened and endangered species in the Commonwealth and a brief description of the content of the section. The relationship between EPA's intended action on the permit regulation and threatened or endangered species will also be addressed.

#### **Chapter 92: National Pollutant Discharge Elimination System Permitting, Monitoring and Compliance**

##### *Section 92.2. Incorporation of Federal regulations by reference*

Pennsylvania is incorporating a number of Federal NPDES regulations by reference. These are:

40 CFR §§ 122.2; 122.4; 122.5; 122.7(b); 122.21(g)(1)-(7), (9)-(13), (h), (i)(2), (j), (k), (l), (m)(6) and (p); 122.24; 122.25; 122.26(a)-(b), (c)(1), (d), (e)(1), (3)-(7), and (f)-(g); 122.27; 122.29; 122.41(a)-(m); 122.42; 122.43; 122.44; 122.45; 122.48; 122.50; 122.61-122.64; 124.57(a); 125.1-125.3; 125.10; 125.11; 125.30-125.32; 124.62(a)(3), (e)(1) and (f); 125.70-125.73; 125.100-125.104.

These regulations were in existence when the Memorandum of Agreement (MOA) between the EPA, FWS and NMFS regarding enhanced coordination under the CWA and ESA was negotiated. It is EPA Region III's presumption that if these regulations had been of concern to the FWS and the NMFS they would have been addressed in the MOA, or in a followup national consultation. Therefore, these regulations will not be addressed individually in this evaluation.

#### *Section 92.2a. Treatment requirements*

This section indicates how specific treatment requirements and effluent limitations for each discharge shall be established. Section 92.2a(c) also states that "If the Department has confirmed the presence or critical habitat of endangered or threatened species under Federal or State law or regulation, discharges to these waters shall be limited to ensure the protection of these species and critical habitat."

This provision is intended to limit impacts to threatened and endangered species, and therefore we find that this regulation may effect, but will not adversely effect such species in Pennsylvania.

#### *Section 92.2b. Pollution Prevention*

This provision simply states the PADEP's commitment to pollution prevention. Any efforts toward reuse, recycling, treatment and disposal beyond the requirements of the NPDES regulations would only be beneficial to threatened and endangered species.

#### *Section 92.2c. Minimum sewage and industrial waste treatment requirements*

The impact of combined sewer overflows (CSOs) is discussed under §92.21a of this biological evaluation. This provision also discusses the prohibition of SSOs, which is beneficial to threatened and endangered species.

This section also speaks to secondary treatment for sewage, and industrial waste regulation. For secondary treatment, Pennsylvania incorporates by reference Federal regulation at 40 CFR Part 133. As stated previously, it is EPA Region III's presumption that if these Federal regulations had been of concern to the FWS and the NMFS they would have been addressed in the MOA, or in a followup national consultation, so they will not be addressed in this evaluation. The other issues addressed in this section are of primary concern for human health protection.

The industrial waste regulation will be discussed under Chapter 95.

#### *Section 92.2d. Technology-based standards*

Technology-based standards are established in accordance with Federal regulations, and therefore this evaluation will not address §92.2d(1) and (2). Section 92.2d(3), however, deals with facilities utilizing chlorine, and EPA recognizes that this is a topic in which the FWS has a great deal of interest.

EPA also supports the use of the "best available technology" effluent limitation for total residual chlorine (TRC), either 0.5 mg/L or a facility-specific number. EPA continues to pursue the issue of Pennsylvania's implementation of water quality-based TRC effluent limits. The Region is working with Headquarters and other Regional offices to explore the validity of the concept of "chlorine demand," and perhaps the need for chlorine demand numbers that are specific to and protective of Pennsylvania waters.

#### *Section 92.5a. CAFOs*

One of the significant changes to the NPDES regulations resulting from the RBI was the addition of regulations addressing Concentrated Animal Feeding Operations (CAFOs). CAFOs are significant contributors to water quality impairments due to nutrients and excessive erosion and sediment. The requirement that all CAFOs now be permitted will afford protection to not only threatened and endangered species, but all aquatic species.

EPA finds that these CAFO regulations will not adversely effect threatened and endangered species, and may even have a beneficial effect.

#### *Section 92.8a. Changes in treatment requirements.*

In this provision, PADEP requires dischargers to react to changes in waters quality standards regulations, wastewater treatment requirements, and water quality standards implementation that impose additional requirements. Dischargers are required to either submit a report establishing that their existing facilities can meet the new requirements, or submit a schedule setting forth the steps needed to comply with the new requirements.

EPA finds that this provision may effect, but will not adversely affect, Federally-listed threatened and endangered species or their critical habitats in Pennsylvania. Our rationale for this finding is that this provision applies when additional water quality criteria or treatment requirements, which EPA assumes would mean additional protection for target species.

#### *Section 92.15. Regional Administrator's right to object to the issuance or modification of certain permits*

This section indicates that the EPA Administrator has the right to review or object to issuance of certain permits. EPA has entered into an MOA that authorizes Pennsylvania to issue NPDES permits, with EPA oversight. That oversight includes EPA's review of all major NPDES permits, and allows us to request to review certain minor NPDES permits. It also notes our authority to object to permits.

EPA has determined that this provision may effect, but will not adversely affect threatened and endangered species. Our rationale is that Pennsylvania appears to have adequate authority to protect threatened and endangered species through its NPDES regulations, but should they not exercise that authority, these regulations acknowledge EPA's ability to object to a permit.

#### *Section 92.21. Applications.*

In this section, PADEP specifies the information that a discharger must submit with an application to commence discharge. In addition to the information that the discharger must submit, there are a number of additional information items that the regulation specifies that PADEP may require. A number of these provisions may be beneficial for the protection of threatened and endangered species. For example, PADEP may ask for information relating to the biological, physical and chemical characteristics of waters and habitat immediately upstream and



downstream of the proposed discharge (see §92.21(c)(3)); and, additional qualitative data and bioassays to assess the relative toxicity of discharges to aquatic life (see §92.21(d)(3)). EPA believes that these regulations could allow PADEP to require information on the location and condition of threatened and endangered species, and the assess the effects of the discharge on these species.

#### *Section 92.21a. Additional application requirements for classes of dischargers*

There are a number of provisions in this section which may be of interest to the Services. These are: §92.21a(d), which discusses the requirements for stormwater discharges associated with industrial activity; §92.21a(e), which specifies the dischargers that would be required to provide the results of whole effluent toxicity testing (WETT); §92.21a(f), which specifies information that CSO dischargers must submit.

Regarding §92.21a(d), PADEP regulates industrial stormwater in accordance with 40 CFR 122.21(k), which is incorporated by reference, so it will not be discussed in this evaluation. However, PADEP adds the additional requirements of erosion and sediment control for construction activities. These regulations are found at PA Code §102.4, and require specific erosion and sediment controls for agricultural plowing or tilling activities and earth disturbance activities, and also on a case-by-case basis as necessary to protect water quality and designated uses. Based on the information that is required by these control plans, regulation 92.21a(d), especially as it relates to construction activities, may effect, but would not adversely affect threatened and endangered species and their critical habitat. EPA bases this finding on the BMPs that are required to minimize the impact from these activities and the plan maps, soils maps, the location of waters, drainage patterns, etc. that are required and would assist EPA and the Services in determining the impacts of the activity.

Section 92.21a(e), may effect threatened and endangered species, but would not adversely effect them. WETT would indicate whether the discharge was toxic, and would allow PADEP to take action should the results of WETT indicate toxicity.

Finally, CSOs have a large impact on water quality in Pennsylvania. EPA believes that this provision would effect, but would not adversely effect, threatened and endangered species. We base this finding on the premise that EPA would expect that any long-term control plan (LTCP) that is required by this provision, would include the identification and protection of threatened and endangered species.

#### *Section 92.31. Effluent limitations or standards*

This provision of Pennsylvania regulation clearly gives PADEP the authority to protect threatened and endangered species. Before an application for a permit can be approved, PADEP must ensure that a number of conditions are met. The most significant of these provisions in terms of the protection of threatened and endangered species is the requirement under §92.31(a)(10) that indicates that a permit will not be issued for the discharge of pollutants unless the proposed discharge is in compliance with antidegradation requirements. These requirements,



found at §93.4c, clearly indicate that if PADEP has confirmed the presence, critical habitat, or critical dependence of endangered or threatened Federal or Pennsylvania species in or on a surface water, PADEP will ensure protection of the species and critical habitat. This provision may effect, but would not adversely effect, threatened and endangered species.

#### *Section 92.41. Monitoring*

The regular monitoring of a discharge is very important to the protection of threatened and endangered species. An NPDES permit allows for the discharge of toxic, conventional, non-conventional and other pollutants, but only at levels that are determined to protect water quality. Regular monitoring will indicate whether a discharge is exceeding its permitted levels, and would allow PADEP, or perhaps EPA, to take action should monitoring reports indicate a pattern of noncompliance. Therefore, EPA finds that this section may effect, but will not adversely impact, threatened and endangered species and their critical habitat.

#### *Section 92.51. Standard conditions in all permits*

This section establishes rather general conditions that will be placed in all NPDES permits. It is significant to threatened and endangered species protection only in that it allows PADEP authority to require a new application in cases or modified discharge, the authority to modify, suspend or revoke a permit, and the authority to enter a permittee's premises and conduct an inspection. All of these provisions may be important should an impact to threatened and endangered species be determined to be associated with a particular discharge.

#### *Section 92.52a. Site specific permit conditions*

It is conceivable that this provision of Pennsylvania regulation could be used to impose additional permit conditions to protect threatened and endangered species. Therefore, EPA finds that this section may effect, but will not adversely effect, threatened and endangered species.

#### *Section 92.53. Additional standard conditions in permits for publicly-owned treatment works which serve industrial users*

This regulation requires that a POTW inform PADEP if it takes on a new industrial user. If the new user would significantly change the discharge, the impact of this provision on threatened and endangered species would be more appropriately assessed through PADEP's authority to modify permits.

#### *Section 92.55. Schedules of compliance*

This provision allows for existing discharges to receive schedules of compliance to take specific steps to remedy a violation of the standards and limitations. EPA accepts the use of compliance schedules if it is allowing a discharger to come into compliance with a new requirement, and does have objection authority over permits that contain compliance schedules. EPA would require that compliance schedule assigned to a facility who discharges to a stream that supports

threatened and endangered species to consider protection of such species, and could exercise our objection authority should we find otherwise.

Based on EPA's ability to object to compliance schedules in NPDES permits, we find that this provision should not adversely effect threatened and endangered species.

*Section 92.57. Effluent limitations*

This section would allow PADEP to impose limitations on frequency of discharge, concentrations or percentage removal, and may include instantaneous maximum limits, BMPs or other limitations, as necessary. EPA finds that this may effect, but will not adversely effect, threatened and endangered species, in that we believe that this provision could allow PADEP to impose additional protections for these species if necessary.

*Section 92.59. Documentation for permit conditions*

This provision would require the Department to prepare documentation demonstrating that the permit will violate applicable water quality standards. This provision references §92.31, EPA assumes that means that PADEP must document that the permit is in compliance with antidegradation requirements. Based on this assumption, we find that this section may effect, but will not adversely effect, threatened and endangered species in Pennsylvania.

*Section 92.61. Public notice of permit application and public hearing*

*Section 92.67. Notice of reissuance of permits*

The public notice of permit application (see §92.61), and the notice of reissuance of permits (see §92.67), are crucial steps in the protection of threatened and endangered species. Although the public notice content does not require the identification of the presence of threatened and endangered species, it does provide enough information to locate the discharge site. Based on the information provided in the notice (and with the assistance of the Services), EPA can determine if threatened and endangered species are present. In many cases, the public notice will be our first indication that a discharge is being established or renewed where these species are present. We therefore find that this provision may effect, but will not adversely effect, threatened and endangered species.

*Section 92.65. Notice to other government agencies*

The Services should take advantage of the provisions of §92.65(5) which indicates that PADEP will provide a subscription to the *Pennsylvania Bulletin* and transmit fact sheets for any Federal agency upon request. EPA notes that this section does not contain the specific language found in 40 CFR §124.59, but we believe that the intent of the section is represented in Pennsylvania regulation.

### *Section 92.71. Interim standards*

As this section refers to compliance with Federal statutes in the absence of effluent standards and limitations, this evaluation will not address, since Federal NPDES statutes were not addressed in the MOA between EPA and the Services.

### *Section 92.73. Prohibition of certain discharges*

The key provision in this section is §92.73(4), which indicates that a permit will not be issued, modified, renewed or reissued when the EPA Regional Administrator has objected to the issuance of a permit (this authority has been delegated to the Division Director). This authority could be enacted if EPA finds that an NPDES permit will not protect threatened or endangered species. Therefore, this provision may effect, but will not adversely effect, threatened or endangered species in Pennsylvania.

### *Section 92.81. General NPDES permits*

### *Section 92.82. Public notice and public hearing*

### *Section 92.83. Inclusion of individual dischargers in general NPDES permits.*

General NPDES permits are issued to discharges that individually and cumulatively do not have the potential to cause significant adverse environmental impact. To understand how general permits can be protective of threatened and endangered species, these provisions must be considered together.

General permits are minor discharges that are anticipated to have no impact on water quality at all, and, as such, should have no effect on threatened and endangered species. The primary concern with general permits would be if a discharger that does have an impact would be included under the general permit. PADEP has adequate authority to amend, revoke, suspend or terminate any previously issued coverage under a general NPDES permit, and require the point source discharger to apply for an individual NPDES permit. Also, the regulation allows that an interested person may petition PADEP to require an individual permit.

Based on this information, EPA finds that general permits, in of themselves, will have no effect on threatened and endangered species. However, should an individual discharge covered under a general permit be found to have an impact on water quality, and especially threatened and endangered species, EPA expects PADEP to require an individual NPDES permit with appropriate protections.

## **Chapter 95. Wastewater Treatment Requirements**

### *Section 95.2. Quality standards and oil-bearing wastewaters*

This provision sets forth the pH and iron requirements for a discharger, as well as requirements for oil-bearing wastewaters and petroleum marketing terminals. These limitations are mainly technology-based, and would be superceded by water quality-based requirements should those be



more protective. As this section is requiring treatments to protect water quality, EPA finds that this provision may effect, but will not adversely affect, threatened and endangered species in Pennsylvania.

*Section 95.4. Extensions of time to achieve water quality based effluent limitations.*

This provision differs from Section 92.55, Schedules of compliance, in that in these cases there is no known technology that will allow an existing discharges to achieve water quality based effluent limitations. EPA would accept the use of time extensions if it is affirmatively demonstrated that the discharger had installed the best technology available, and we do have objection authority over permits that utilize time extensions. EPA would require that facilities receiving time extensions and who discharge to a stream that supports threatened and endangered species to consider protection of such species, and could exercise our objection authority should we find otherwise.

Based on EPA's ability to object to NPDES permits that contain time extensions, we find that this provision should not adversely effect threatened and endangered species.

*Section 95.5. Treatment requirements for discharges to waters affected by abandoned mine drainage.*

This provision is intended to apply only to those streams that are currently being impacted by abandoned mine drainage to the point where aquatic communities are essentially excluded. As the assumption is there are few if any aquatic species, and this section is intended to improve water quality only, we find this section will have no effect on threatened and endangered species.

**Summary:**

EPA Region 3 believes that, based on this evaluation, Pennsylvania's NPDES regulation overall should have no effect on threatened and endangered species, and in many cases will have a beneficial effect on such species. Pennsylvania appears to have adequate authority to protect threatened and endangered species. Should they not exercise that authority, these regulations acknowledge EPA's ability to object to a permit.

The effect of these regulations will be most effectively assessed on a permit-by-permit basis. Based on this assumption, in order to protect threatened and endangered species it is advised that EPA and the Services work together to identify categories (in terms of locations, pollutants discharged and discharge types) of major NPDES permits that would receive an EPA review with an eye toward the protection of such species and possible consultation. It is also imperative that the Services inform EPA of specific major permits in which they have interest, and minor NPDES permits of concern as they are public noticed.



## References:

- (1) National Marine Fisheries Service, 1998. Recovery Plan for the Shortnose Sturgeon (*Acipenser brevirostrum*). Prepared by the Shortnose Sturgeon Recovery Team for the National Marine Fisheries Service, Silver Spring, Maryland. 104pp.
- (2) U.S. Fish and Wildlife Service, 1988. Atlantic Coast Piping Plover Recovery Plan. U.S. Fish and Wildlife Service, Newton Corner, MA. 77pp.
- (3) U.S. Fish and Wildlife Service, 1983. Recovery Plan for the Indiana Bat. U.S. Fish and Wildlife Service, Newton Corner, MA. 99pp.
- (4) U.S. Fish and Wildlife Service. 1993. Northeastern Bulrush (*Scirpus ancistrochaetus*) Recovery Plan. Hadley, Massachusetts. 70pp.
- (5) U.S. Fish and Wildlife Service. 1994. Clubshell (*Pleurobema clava*) and Northern Riffleshell (*Epioblasma torulosa rangiana*) Recovery Plan. Hadley, Massachusetts. 68pp.
- (6) Wild Resource Conservation Fund. 1995. Endangered and Threatened Species of Pennsylvania.

## Attachments:

- (1) List of threatened and endangered species in Pennsylvania.
- (2) Title 25, Chapter 92, National Pollutant Discharge Elimination System Permitting, Monitoring and Compliance.
- (3) Title 25, Chapter 95, Wastewater Treatment Requirements.

